No. 06- 061336 FEB 09 2007

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IN THE

Supreme Court of the United States

DAVID ALAN COOPER,

Petitioner,

v.

AMERICAN AIRLINES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Tenth Circuit affirmed the District Court's grant of Summary Judgement to American Airlines, Inc. (hereinafter, "American") and overruled David Cooper's (hereinafter, "Cooper") Cross Motion for Summary Judgement on his claims of Racial Discrimination brought under the authority of U.S.C. 42 § 2000e-2(a)(1), and racial Interference with Contract Rights set forth within U.S.C. 42 § 1981.

1. Was the denial of Mr. Cooper's Motion for Summary Judgement and the entry of Summary Judgement for American inappropriate?

2. Was the grabbing of Mr. Cooper (a Black American Citizen) by Randy McDonald (a Caucasian co-worker), who then forced his leg inside Mr. Cooper's legs, intertwining the legs around one another and then physically humped Mr. Cooper while other Caucasian co-workers chanted racial slurs and African gibberish; all of which is racial discrimination within the meaning of U.S.C. 42 § 2000e-2(a)(1)?

3. Did American approve of the discriminatory acts when Its Managing Director of Facilities and Security, Bob Jackson, and Its Senior Vice-President, Carmine Romano, observed the discriminatory occurrences and yet refused and/or failed to do nothing? Thereafter they subsequently, threatened Mr. Cooper and the aggressor, Randy McDonald, with disciplinary action if Mr. McDonald didn't stop his acts of humping, mocking and deriding Mr. Cooper?

4. Was the assault and battery by incumbent Transport Workers Union President, Randy McDonald, upon Mr. Cooper, who was the only black solicitor of the twenty plus (20+) solicitor(s) passing out union election cards in support of contracting with a new union; a violation of Mr. Cooper's rights to contract within the meaning of U.S.C. 42 § 1981. Notwithstanding the Railway Labor Act's provision(s) contained within U.S.C. 45 § 152 (3)(4) which mandate that designation of a union is to be free from interference?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, David Alan Cooper, respectfully petitions for a Writ of Certiorari to review the judgement of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

On 27 April 2006, the United States District Court for the Northern District of Oklahoma did grant Summary Judgement for Respondent, American Airlines, Inc., and concurrently denied Petitioner, David Cooper's Cross Motion for Summary Judgement. Said Judgement was subsequently appealed to the Tenth Circuit Court of Appeals. The Tenth Circuit affirmed the District Court by an unpublished opinion. The Tenth Circuit's unpublished opinion and the District Court's Summary Judgement Opinion and Decision are attached hereto as Appendixes A and B.

STATEMENT OF JURISDICTION

The United States District Court for the Northern District of Oklahoma exercised jurisdiction in accordance with Title 28 United States Code, Section 1331. Jurisdiction was bestowed upon the Tenth Circuit in accordance with Title 28 United States Code, Section 1291. Jurisdiction is appropriate with this Court in accordance with Title 28 United States Code, Section 1254(1).

STATUTORY PROVISIONS INVOLVED

The provisions of Title 42 United States Code, Section 2000e-2(a) (1), as same pertains to racial discrimination; as well as Title 42 United States Code, Section 1981(a)(b), pertaining to minority rights to make and enforcement contracts; as applied to Title 45 of the United States Code, Section 152(3)(4)&(8), regarding Employee right(s) to designate a union of choice without interference are the statutory provisions relied upon by Mr. Cooper.

STATEMENT OF THE CASE

I. 42 § 2000e-2 Discrimination

Petitioner, David Alan Cooper, a member of the Transport Workers Union ("TWU"), a twenty (20) year veteran employee of American Airlines, Inc. sought and supported a drive to elect new union representation; as did many other members of American's work force. In furtherance of their goal, Mr. Cooper and others initiated a drive for an election in support and in sponsorship of the Aircraft Mechanics Fraternal Association Union ("AMFA"). In keeping with said initiative, Mr. Cooper along with several other American Airlines, Inc.'s employees requested and were granted permission to pass out union election card(s) at American's twenty plus (20+) employee entry gates. Out of these, Mr. Cooper was the only "Black American" within the group designated to pass out union election cards for endorsement of AMFA,

While Mr. Cooper was passing out election cards in support of AMFA at one of American's employee

entry gate(s), the current TWU Union President, Randy McDonald ("McDonald"), approached him. As he approached, Mr. Cooper handed McDonald an election card. Typically, opposing union members request same in order to keep abreast of the two unions' respective claims, positions and issues. McDonald snatched the card out of Cooper's hand and threw it on the ground. Thereafter McDonald forced his leg inside and between Mr. Cooper's legs, then wrapped his leg around Mr. Cooper's leg, and began humping Mr. Cooper like a dog in heat, while other TWU supporter(s) gathered and began chanting racial slurs and African gibberish mocking Mr. Cooper, as McDonald continued humping Mr. Cooper's leg.

Moments after the events began, American's Director of Plant Facilities and Security, Mr. Bob Jackson, appeared within the proximity of the gate and observed the events. When McDonald observed Jackson, He stopped humping Mr. Cooper's leg, and sojourned to where Jackson stood. McDonald and Jackson conversed briefly; however their conference ended abruptly when McDonald struck Jackson on the forearm which resulted in Jackson's immediate exit from the area.

After Jackson left, McDonald returned to where Cooper continued passing out union election cards, and again began humping Mr. Cooper's leg in the same vulgar manner as he had previously. Shortly thereafter, another of American's Senior Officer(s) at Its Tulsa Facility, Vice-President, Carmine Romano, walked out of American's Administrative Offices, and he too observed McDonald's degrading and vulgar acts and racial slurs against Mr. Cooper.

When McDonald observed Romano, he stopped what he was doing and engaged in a conversation with Romano. After the parties conferred, McDonald returned to where Mr. Cooper had continued passing out union election cards and again began the same humiliating, degrading and vulgar acts against Mr. Cooper. As McDonald renewed his actions, other employees which were not associated with the Transport Workers Union began asking Vice-President, Romano repeatedly to do something to stop McDonald. In response, Vice-President, Romano threatened Mr. Cooper and McDonald with disciplinary action, although Mr. Cooper had done nothing other than attempt to walk away from McDonald to avoid the repeated batteries upon him.

Within the Tenth Circuit's unpublished opinion at pgs. -2 & 3-, the Tenth acknowledges the contents of four (4), American Airlines Employee; Mr(s). Steve Smith, Keith Richter, Dave Stewart, and Bob Roberts' affidavits. Wherein they recite within their affidavits that "* * * [A]merican gave Mr. Cooper and others permission to distribute AMFA flyers and other materials at the base * * *". That Randy McDonald, a white male, who was at the time President of the TWU Union, "physically confronted Mr. Cooper and tried to wrestle away the flyers he was passing out and that He ("McDonald") also began "pressing and bumping and humping Mr. Cooper's leg". It is further set forth within the affidavits that "* * * McDonald swung at and hit Mr. Jackson" and that Mr. Jackson backed away, and McDonald resumed his confrontation of Mr. Cooper while other American employees chanted "African Gibberish" and racial slurs. Unquestionably, the Affidavits attested to the continued battery that occurred on Mr. Cooper,

See Appendix, "A" Tenth Circuit Order and Judgment. The Tenth's evaluation and weight assessed each affidavit was inappropriate as was the District Court's grant of summary judgement based upon the same arbitrary assigned weight. Summary Judgement is appropriate in accordance with Fed.R.Civ.P., Rule 56 if there are no genuine issues of controverted material facts; and the moving party is entitled to judgement as a matter of law, *Saul v. Stephan*, 83 F.3d 1208, 1212 (10th Cir. 1996). This court in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) informed that summary judgement should only be granted "if it appears that there is no genuine issue as to any material fact and that the moving party is entitled to judgement as a matter of law". Further informing, that summary judgment will not lie if there is a "genuine" disputed fact or if a reasonable jury could return a verdict for the nonmoving party. *Id.* at 258-9. Here, the Tenth weighed the evidence rather than making a determination as to whether there were controverted facts at issue. Thus said determination was inappropriate given the controverted facts and events because in order to grant American Summary Judgement the court must be able to determine there are no facts at issue. More importantly, the sworn testimony of Mr(s). Smith, Richter, Stewart and Roberts as well as others who provided affidavits, went uncontroverted.

Mr. Cooper submits that had the sworn testimony given in the afore affidavits by Mr(s). Smith, Richter, Stewart, and Roberts been given there proper weight the summary judgement entered for American would not have occurred. Notwithstanding, the Tenth's acknowledgment of the intentional discrimination

and with asserted justification that McDonald was disciplined; although no discipline actually occurred. The asserted discipline was in fact only a written warning de-minus of any effect or discipline; which was inapposite and contrary to American's written rules of conduct, policies and procedures and practices relating to employee conduct; which definitely included rules against acts of battery. Yet American asserts no foul; and disavows acknowledgment of the intentional disparaging discriminatory treatment of Mr. Cooper. Moreover Mr. Cooper's right to contract with a union of his choice was impaired by the intentional racially motivated battery, and humiliating racial innuendos and slurs. As a result, Mr. Cooper, who has been a model veteran employee for American, in excess of twenty (20+) years, has for the first time in is life, sought professional help and treatment for his emotional injuries.

Of equal importance, the Tenth's unpublished opinion departs from Its precedent and settled law pertaining to racial discrimination. For example, in *Herrera v. Lufkin Industries*, 474 F.3d 675 (10th Cir. 2007), the Tenth, evaluating circumstances where the Plaintiff/Appellant, a Mexican, who had brought a Title VII claim for a racially hostile work environment occasioned by his supervisors and co-workers calling him "the Mexican", or "that fu— Mexican" reversed the District Court's granted of summary judgement to Lufkin with a finding that Lufkin was liable under Title VII for a racially hostile work environment created by its supervisors. *Id.* at 682. In doing so, the Tenth reversed the Summary Judgement that had been granted employer, Lufkin on all issues. In comparison, the severity of the battery on Mr. Cooper along with the

demeaning and degrading African gibberish and racial slurs made while Mr. Cooper was being battered were much more egregious than the occurrences in *Herrera*. The egregious racial discrimination of Mr. Cooper was much more severe than the occurrences in *Herrera*, because they were orchestrated in a compound fashion as reflected by McDonald's continuous battery upon Mr. Cooper followed by the chants of racial slurs as the discriminatory African gibberish occurred. Of equal importance, was American Airlines Inc.'s endorsement and encouragement of the discriminatory acts through Its Upper- Management personnel, Bob Jackson and Carmine Romano's failure and/or refusal to act, in any manner, consistent with the rules and regulations that they help to write and implement through American's Employee Handbook. All of this motivated and occurred because American's management personnel wished to retain the existing TWU Union. What other explanation is there for the orchestrated assault followed by the battery of Mr. Cooper (a twenty (20) year American veteran employee with an impeccable record who had been previously named employee of the month and recognized for his work ethics and accomplishments.) The intentional and racially motivated acts which were so degrading, humiliating and destructive to Mr. Cooper were strictly prohibited by American's very own policies and procedures set forth in Its Employee Handbook, and separately within its rules of conduct, which were endorsed and implemented by American's Upper Management to ensure a safe and proper work environment for all employees, regardless of race, creed, color, religion or national origin; and an environment and work place free from the type of injuries Mr. Cooper sustained. All of which are prohibited by Title 45 §§ 2000e, 1981.

In *Burlington N. & S.F.R. Co. v. White*,05-529, 126 S.Ct. 2405, this Court upheld a jury verdict relating to retaliatory discrimination, occasioned when a female forklift driver was reassigned to accomplish physical labor on the tracks in retaliation for her refusal to succumb to her supervisor's sexual advances and her complaint against him relating to same. Wherein this Court held that "a reassignment of duties can constitute retaliatory discrimination where both the former and present duties fall within the same job description."

Here the two (2) separate acts of battery upon Mr. Cooper were both retaliatory because he was supporting a rival union and discriminatory because of his race and support for the AMFA union. Said acts were intentional and retaliatory as emphasized by American's encouragement of McDonald's acts of battery; condoned and supported by American's Vice-President, Romano and Director, Jackson, although said acts are unquestionably discriminatory yet neither party, Jackson or Romano, stopped the occurrences which further points to the intentional nature of the orchestrated discriminatory acts that resulted in the emotional crippling of Mr. Cooper.

In *Goodman v. Lukens Steel Co.*, 482 U.S. 656 (1987) this Court, after review of a union's different treatment of black members which was different and less favorable than the treatment afforded its white membership, found that the union had tolerated racial discrimination by not representing the black parties who had been terminated because of or relating to acts of discrimination. Finding that the union had not represented properly the discriminatory discharges as same related to

probationary employees, But instead, tacitly encouraging racial harassment, *Id.* at 659-660.

This Court has also reviewed "disparate treatment" within the context of racial discrimination, Informing that an element of disparate treatment is intentional racial discrimination which is distinguished from disparate -impact discrimination. Here the intentional racial discrimination element discussed in *Goodman* was obviously present when the TWU Union refused to assist Its "Black" member, Mr. Cooper. Notwithstanding the Tenth's decision that found "no foul", said decision is in error because it totally disregarded the facts of the case which included the fact that "Randy McDonald" a white male who was at the he time President of the TWU Union, physically confronted Mr. Cooper and tried to wrestle away the flyers he was passing out and began "pressing and bumping and humping Mr. Cooper's leg" a fact attested to by American employees Mr(s). Steve Smith, Keith Richter, Dave Stewart, and Bob Roberts. The Tenth did not further acknowledge properly that "* * * McDonald swung at and hit Mr. Jackson" and that Mr. Jackson backed away and Mr. McDonald resumed his confrontation of Mr. Cooper which included making "African Gibberish" and racial discriminatory slurs as well as the continued battery upon Mr. Cooper which was accomplished by Mr. McDonald's humping of Mr. Cooper's leg. Unquestionably these acts were deliberate and intentional. How else would one accomplish humping of another's leg unless one had an intent to do so? Furthermore, how could someone unintentionally make racially derogatory utterances and racial slurs to another? Clearly there was intentional discrimination of Mr. Cooper, because said acts were deliberate, in every respect. Therefore, this

Court's holding in *Goodman* that in order for there to be "disparate treatment" racial discrimination there must also have been intentional racial discrimination applies to the events before this Court.

In *Goodman* this Court found that § 1981 had been violated as well as Title VII. In that regard, this Court informed that there had been and existed a policy of refusing to file giveable claim(s) based upon race. That the unions were categorizing racial grievances as unworthy while filing similar grievances for white workers; which was compounded by the fact that the Employer, Luken Steel Co. was aware of the practice of discriminatory presentment of said claims. Thus the finding that there existed intentional discrimination against the blacks who sought a remedy for such disparate treatment, *Id.* at 669-670.

In *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993) this Court addressing a gender discrimination claim informed that Title VII of the Civil Rights Act makes it "an unlawful employment practice of an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment because of such individuals's race, color, religion, sex or national origin." *Id.* at 22. Then added "* * * [T]hat discriminatory conduct can be so severe or pervasive that it creates a work environment abusive to employees because of their race, gender, religion, or national origin which offends Title VII's broad rule of workplace equality." *Id.* at 23. The discriminatory acts in *Harris* were insults made to Ms. Harris

as well as unwanted sexual innuendos and comments. Here, not only was Mr. Cooper physically discriminated against by the physical humping of his body, he was additionally discriminated against when his co-workers engaged in racial derogatory, discriminatory, demeaning and humiliating remarks and cat calls of African gibberish while he was being battered by McDonald.

II. Employer Liability

Unquestionably, the Employer, American Airlines, Inc. is liable for all of the afore discriminatory acts of its employee, Randy McDonald, and the support thereof by Security Director Bob Jackson and Vice President, Carmine Romano, enhanced by the other unnamed American employees who chose to add to the racial mayhem of Mr. Cooper by chanting racial slurs and cat calls of African gibberish used to intimidate and ridicule, embarrass and humiliate Mr. Cooper. In *Meyer v. Holey*, 537 U.S. 280 (2003) the employer was held liable for the acts of its employees. Such liability was found to exist without regard for "The act" because the assignment of liability is without fault, and the employer is found liable in accordance with traditional agency principles, *i.e.*, it normally imposes vicarious liability upon the corporation but not upon its officers or owners". *Id.*

III. 42 § 1981 Contract Liability

The same acts of discrimination suffered by Mr. Cooper at the hands of Randy McDonald, condoned and supported by American's Director, Bob Jackson and Vice President, Carmine Romano,

supports a finding that American interfered with Mr. Cooper's right to contract for union representation of his choice. A mandated right under U.S.C 45 § 152 (3)(4) &(8); extended to Mr. Cooper by the provisions of U.S.C 42 § 1981 as same pertains to his right to contract, which provides in general that it is an unlawful practice to interfere with a minority's protected rights to contract. It that regard, it is helpful to review the events pertaining to the discriminatory acts accomplished upon Mr. Cooper, which included the fact that Mr. Cooper requested and was given permission to pass out union election cards. A protected activity set forth with the Railway Labor Act, Title 45 United States Code, Section 152(3)(4)(8); that was recognized by this Court as early as 1937, in *Virginian Ry. v. Federation*, 57 S.Ct. 592 (1937), wherein this Court confirmed and upheld the Railway Labor Act's prohibition against employer interference with its employee's free choice and selection of union representation of choice. More recently, in *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470 (U.S. 2006) it was found that a claim brought under § 1981 must initially identify an impaired "contractual relationship." In that regard, Mr. Cooper submits that the discriminatory acts against him occurred while he was soliciting support for a union election and union representation of his and other American employees' choice. Impaired and interfered with by Randy McDonald's vulgar and forceful discriminatory acts and other American co-workers who supported the TWU Union racially humiliated and degraded him while others gave chase with racial cat calls and African gibberish and slurs. In keeping with *Domino's* opinion, a contract need not already exist for there to be an interference with a party's contract. Thus, Mr. Cooper's right of contract was interfered with when American allowed

Its agent, Randy McDonald, to batter Him while he was accomplishing the protected activity of obtaining the necessary ballets to elect a union of choice.

Mr. Cooper submits the same facts are supported in *Tyler v. Re/Max Mountain States, Inc.*, 220 F.3d 1220 (10th 2000) wherein it was held that "42 U.S.C. § 1981" ensures, among other rights, that person of all race shall have equal rights to make and enforce contracts. A § 1981 plaintiff alleging racial discrimination may prove intentional discrimination through either direct or circumstantial evidence.

REASONS FOR GRANTING THE PETITION

The First reason in support of Mr. Cooper's quest for grant of this Writ is the Tenth Circuit's holding in *Herrera v. Lufkin Industries,* 474 F.3d 675 (10th Cir. 2007) which is inapposite Its decision that is before this Court. In the present cause the Tenth held no racial discrimination occurred when Mr. Cooper was battered while his co-workers chanted racial slurs and gibberish. In comparison, the racial acts in Herrera were only the calling of a Mexican, "the Mexican" or the "f— Mexican"; which were found to have created a racially hostile environment. *Id.* at 680. Which causes Mr. Cooper to question the District Court's grant of summary judgement to American Airlines, Inc., with a finding no racial discrimination. Although Mr. Cooper had been racially battered in front of numerous other American employees. Yet in *Herrera*, there was no battery or racial slurs, however the Tenth reversed a finding of no discrimination with assertion that there was an evidentiary basis, however a jury found that discrimination had occurred. In comparison, the Tenth found that

Mr. Cooper had not been racially discriminated against; and discounted the sworn testimony of four (4) persons who informed of their individual observations of the discriminatory acts accomplished on Mr. Cooper. Of equal importance, Mr. Cooper was the only individual battered although there were at least twenty (20) other caucasian employees present at American's various employee entry gates. None of whom experienced an incident while passing out union election cards. Thus the Tenth's unpublished opinion finding that no racial discriminatory motive was present is simply untenable.

The second reason this Court should grant Mr. Cooper's Writ is because the Tenth Circuit's opinion is inapposite of this Court's holding in *Virginian Ry. v. Federation,* 57 S.Ct. 592 (1937) wherein it was held that an employer is enjoined from interfering with it's employee's free choice of union representation. Here, Mr. Cooper's rights to designate a union of choice was interfered with by Randy McDonald's racially motivated assault and battery on Mr. Cooper, while other American employees chanted racially motivated slurs and African gibberish. Randy McDonald grabbed the union election cards from Mr. Cooper's hands and threw them on the ground and stomped them all of which was approved as evidenced by American Airline's Upper Management's inaction and void of any attempt to stop Mr. McDonald or assure an untenanted union election. Such conduct unquestionably interfered with Mr. Cooper and other American Airlines' employees' rights to choose a union of their choice as mandated by Title 45 of the United States Code, at §152.

The Third reason this Court should grant Mr. Cooper's Writ is American's violation of Mr. Cooper's right to contract with a union of his choice extended him by the mandates of U.S.C. 42 § 1981.

The Forth reason this Court should grant Mr. Cooper's Writ is because of Its interference with Mr. Cooper's contract rights by American when it encouraged the battery that occurred on Mr. Cooper that was aimed at interfering with His rights to sponsor a union of his choice. In total disregard for this Court's decision(s) in *Gratz v. Bollinger*, 539 US. 244 (2003) and *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470 (U.S. 2006). In *Gratz* this Court informed that "Any claim brought under § 1981, * * * must initially identify an impaired 'contractual relationship' under which the plaintiff has rights. Such a contractual relationship need not already exist, because § 1981 protects the would-be contractor along with those who already have made contracts." *Id.* at 598-9.

A Fifth reason this Court should grant Mr. Cooper's writ is because the Tenth Circuit's decision conflicts with the other circuit decisions. For example, it was recognized in *Intern. Ass'n of Machs., Etc. v. N.W. Airlines*, 673 F.2d 700 (3rd Cir. 1992) that 45 U.S.C. § 152 Third provides that parties to a collective bargaining agreement shall designate union representation without "interference, influence, or coercion by either party * * * and makes it unlawful" for any carrier . . . to influence or coerce employees in any effort to induce them to join or remain or not to join or remain members of any labor organization. *Id.* at 708. A similar holding was

reached and published by the sixth circuit in *United Transp. Un. v. Grand Truck West R. Co.*, 901 F.2d 489 (6th Cir. 1990).

CONCLUSION

For the foregoing reasons, Petitioner, David Alan Cooper, respectfully requests that this Court grant review of the Tenth Circuit Decision.

Respectfully submitted,

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APPENDIX

APPENDIX A — ORDER AND JUGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT FILED JANUARY 23, 2007

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 06-5114
(D.C. No. 05-CV-236-JHP-PJC)
(N.D. Okla.)

DAVID ALAN COOPER,

Plaintiff-Appellant,

v.

AMERICAN AIRLINES, INC.,

Defendant-Appellee.

ORDER AND JUDGMENT*

Before **HOLMES**, **McKAY**, and **BRORBY**, Circuit Judges.

Plaintiff David Alan Cooper appeals from the district court's entry of summary judgment in favor

* After examining the briefs and appellate record, this panel has determined unanimously to grant the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

of defendant American Airlines, Inc. (American). We have jurisdiction under 28 U.S.C. § 1291 and affirm.

Mr. Cooper started working for American in 1986 at its Tulsa, Oklahoma, maintenance base and describes himself as "a member of American's black minority work force." Aplt. Opening Br. at 1, ¶ 1. He has worked primarily as a mechanic. The Transport Workers Union of America (TWU) represents mechanics in their labor relations with American at the Tulsa base, but Mr. Cooper supports a rival union, the Aircraft Mechanics Fraternal Association (AMFA). On September 9, 2003, American gave Mr. Cooper and others permission to distribute AMFA flyers and other materials at the base as part of efforts to garner enough support to force an election to determine which of the two unions would represent the mechanics at the base.

While Mr. Cooper was handing out the AMFA flyers, Robert Jackson, who at the time was American's Managing Director of Base Maintenance, informed Mr. Cooper that the TWU was not happy about the distribution of the literature. Shortly thereafter, another American employee, Randy McDonald, who is a white male and at the time was the president of TWU, physically confronted Mr. Cooper and tried to wrestle away the flyers, shouting that Mr. Cooper was destroying TWU membership. He also began "pressing and bumping and humping" Mr. Cooper's leg. Aplt. App., Vol. II at 328, Cooper Depo. at 81:25. Mr. Jackson intervened in an effort to get Mr. McDonald to stop his conduct. A scuffle then ensued during which Mr. McDonald swung at

and hit Mr. Jackson. Mr. Jackson backed away and Mr. McDonald resumed his confrontation of Mr. Cooper, which included making "African gibberish" noises along with another American employee, *id.* at 345, Cooper Depo. at 99:3. According to Mr. Cooper, other American employees chanted derogatory racial slurs.

Base security then arrived accompanied by Carmine Romano, the Vice President of Base Maintenance. Mr. Romano spoke with Mr. McDonald and Mr. Jackson. According to Mr. Cooper, Mr. McDonald then resumed his conduct until Mr. Romano intervened again, after which the incident came to a conclusion.

Mr. Cooper complained about the incident to American's human resources department, and eventually American issued Mr. McDonald a "first-step advisory," which apparently is some type of warning, but did not otherwise discipline him. Mr. Cooper did not receive any discipline as a result of the incident. He continued working in the same position without any change in assignments or responsibilities and without any further harassment by Mr. McDonald. He did, however, file this lawsuit, asserting a disparate treatment claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17, premised on his view that because Mr. McDonald is white, American did not conduct a sufficient investigation of the incident or impose

sufficient discipline on Mr. McDonald.[1] He further asserted a violation of his civil rights under 42 U.S.C. § 1981 to the extent American allegedly denied him an equal right to contract for the union representation of his choice.[2] Each party filed a motion for summary judgment. The district court denied Mr. Cooper's motion and granted American's motion. Mr. Cooper appeals.

"On cross-motions for summary judgment, our review of the summary judgment record is de novo and we must view the inferences to be drawn from affidavits, attached exhibits and depositions in the light most favorable to the party that did not prevail," in this case, Mr. Cooper. *Allen v. Sybase, Inc.*, 468 F.3d 642, 649 (10th Cir. 2006) (quotation omitted). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

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1. Title VII makes it unlawful for an employer to discriminate against any individual based on race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a)(1).

2. In relevant part, "[s]ection 1981 prohibits racial discrimination in 'the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.'" *Reynolds v. Sch. Dist. No. 1*, 69 F.3d 1523, 1532 (10th Cir. 1995) (footnote omitted) (quoting 42 U.S.C. § 1981(b)).

Appendix A

In order to survive summary judgment in Title VII and § 1981 cases under the familiar burden-shifting framework established by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), a plaintiff first must establish the elements of a prima facie case. *See English v. Colo. Dep't of Corr.*, 248 F.3d 1002, 1008 (10th Cir. 2001) (applying *McDonnell Douglas* to both Title VII and § 1981 claims). The district court concluded that Mr. Cooper had not met this burden with regard to any of his claims. As to his disparate treatment claim, the court explained that Mr. Cooper's dissatisfaction with American's efforts to investigate the incident and punish Mr. McDonald did not constitute an adverse employment action, which is one element of the prima facie case for such a claim, *see Trujillo v. Univ. of Colo. Health Scis. Ctr.*, 157 F.3d 1211, 1215 (10th Cir. 1998). The court reasoned that American's efforts had no effect on Mr. Cooper's employment status and found that the disparate treatment claim bordered on frivolous.

Although Mr. Cooper did not assert a hostile work environment claim in his complaint, the district court considered his summary judgment argument that the conduct of which he complained rose to that level. In rejecting that claim, the court first stated that whether the harassment was based on or motivated by race was "thin at best," Aplt. App., Vol. II at 454, particularly in view of the underlying union dispute. Second, the court determined that the harassment did not affect a term or condition of Mr. Cooper's employment and did not constitute the "'steady barrage of opprobrious racial comment' as would offend Title VII." *Id.* at 455 (quoting *Johnson v. Bunny Bread Co.*, 646 F.2d 1250, 1257 (8th Cir.

1981)). And third, considering whether American "'knew or should have known about the conduct and failed to stop it," *see id.* (quoting *Hollins v. Delta Airlines*, 238 F.3d 1255, 1258 (10th Cir. 2001) (further citation omitted)), the court determined that American had not been negligent but had acted reasonably in responding to the incident.

We agree and affirm the district court's disposition of both of Mr. Cooper's Title VII claims for substantially the same reasons stated in the district court's April 27, 2006, order and opinion. The court addressed each issue appropriately, reviewed all the evidence and granted all reasonable inferences from it in the light most favorable to Mr. Cooper, and reached the correct conclusions.

To establish a prima facie case of discrimination under § 1981, Mr. Cooper must show that (i) he "is a member of a protected class"; (ii) American "had the intent to discriminate on the basis of race"; and (iii) "the discrimination interfered with a protected activity as defined in § 1981." *Hampton v. Dillard Dep't Stores, Inc.*, 247 F.3d 1091, 1102 (10th Cir. 2001). As the district court recognized, Mr. Cooper admitted that he did not know of a single mechanic who did not sign a card to force an election between the two unions as a result of the incident. Accordingly, even assuming that Mr. McDonald's conduct can be attributed to American, Mr. Cooper failed to establish any interference with a protected activity as defined in § 1981 as a result of either the incident, American's investigation of it, or American's decision to give Mr. McDonald no discipline other than issuing the "first step advisory," and the claim fails.

Appendix A

The judgment of the district court is AFFIRMED.

Entered for the Court

Monroe G. McKay
Circuit Judge

APPENDIX B — ORDER AND OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA FILED APRIL 27, 2006

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

Case No. 05-CV-236-JHP-PJC

DAVID ALAN COOPER,

Plaintiff,

v.

AMERICAN AIRLINES, INC.,

Defendant.

ORDER AND OPINION

Before the Court are Defendant American Airlines, Inc.'s Motion for Summary Judgment, Plaintiff David Alan Cooper's Response in opposition, and Defendant's Reply thereto, and Plaintiff's Motion for Summary Judgment and Defendant's Response in opposition thereto. In the interests of accuracy and efficiency, the Court treats these Motions as cross-motions for summary judgment. For reasons stated herein, Defendant's Motion is GRANTED in its entirety, and Plaintiff's Motion is DENIED in its entirety.

Appendix B

Background

Plaintiff David Alan Cooper is a black man[1] who has worked for Defendant American Airlines, Inc. since March 1986. At all times relevant to the instant matter, Plaintiff worked as a mechanic on Dock 4A at Defendant's Maintenance and Engineering Base in Tulsa, Oklahoma. The Transport Workers Union of America, AFL-CIO, Local 514 (TWU) represents mechanics in labor relations with Defendant at that site. Plaintiff, however, actively supports the rival union, the Aircraft Mechanics Fraternal Association (AMFA).

During the fall of 2003, AMFA attempted to raise sufficient support among the mechanics at the base to force an election to determine which union would represent them. On September 9, 2003, Defendant gave Plaintiff permission to distribute AMFA flyers. While Plaintiff was distributing flyers, another American employee, Randy McDonald, who is a white man and was president of TWU at the time, confronted Plaintiff about forcing the election between the unions with angry and possibly racist words,[2] and made offensive physical contact with Plaintiff.[3] During this incident, Robert Jackson, a white man and the former Managing Director of Base

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1. Mr. Cooper identifies himself as a Black American, not of African descent.

2. Plaintiff alleges that McDonald made "African gibberish" noises.

3. Plaintiff primarily describes said contact as "humping" his leg.

Maintenance, told Plaintiff and McDonald to stop their altercation. Base security and the highest ranking management official on the Base, Carmine Romano, also came to the scene. Romano also told Plaintiff and McDonald to stop their altercation. Jackson attempted to separate them, during which time McDonald swung at Jackson and hit him.

Following the incident, Plaintiff reported to his dock for work. Later that day, he reported the incident to Jack Wing, the senior human resources investigator on the Base at that time. At Wing's instruction, Plaintiff prepared a written statement. Wing also conducted an investigation of the incident.

McDonald was given a "first-step advisory" for his conduct on September 9, 2003. Plaintiff was not disciplined in any way. He continued to work on Dock 4A without any interruptions in his job assignments or responsibilities, and without any further harassment from McDonald.

Plaintiff complains that Defendant's investigation into the incident on September 9, 2003 was insufficient, and that McDonald's punishment would have been more severe had Plaintiff been white. Plaintiff alleges that he was the only black person distributing AFMA literature at the time of McDonald's attack, and that he was the only AFMA supporter to encounter any harassment, and that part of said harassment was racially charged. Plaintiff further alleges that Defendant denied him his equal rights to support and contract for the union representation of his choice by allowing this incident to happen and by failing to address it adequately. These are the issues currently before the Court.

Appendix B

Discussion

Summary judgment is proper where the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). Summary judgment is also appropriate when the party who bears the burden of proof at trial fails to make a sufficient showing to establish the existence of each and every essential element of its claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Moreover, in the context of a case brought under federal employment laws, the trial court must also "make a judgment as to whether the evidence . . . could persuade a reasonable jury that the employer had discriminated against the plaintiff." *Hooks v. Diamond Crystal Specialty Foods, Inc.*, 997 F.2d 793, 798 (10th Cir. 1993). In this regard, the burden-shifting analysis set forth in *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973), applies to Plaintiffs Title VII and § 1981 claims. *See Thomas v. Denny's Inc.*, 111 F.3d 1506, 1509 (10th Cir. 1997).

In making the summary judgment determination, the Court examines the factual record and draws reasonable inferences therefrom in the light most favorable to the non-moving party. *Simms v. Oklahoma*, 165 F.3d 1321, 1326 (10th Cir. 1999). The presence of a genuine issue of material fact defeats the motion. An issue is "genuine" if the evidence is significantly probative or more than merely colorable such that a jury could reasonably return a verdict for the non-moving party. *Anderson v. Liberty Lobby*,

Inc., 477 U.S. 242, 248 (1986). A fact is "material" if proof thereof might affect the outcome of the lawsuit as assessed from the controlling substantive law. *Id.* at 249.

I. Plaintiff's "disparate treatment" claim.

To demonstrate *a prima facie* case of disparate treatment, a plaintiff must show that (1) he is a member of a protected group; (2) he suffered an adverse employment action; and (3) similarly situated employees were treated differently. *Trujillo v. Univ. of Colo. Health Sci. Ctr.*, 157 F.3d 1211, 1215 (10th Cir. 1998). Failure to establish any one element defeats the claims. *See Celotex Corp.*, 477 U.S. at 323 ("[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.").

The undisputed facts of this case show that Plaintiff did not suffer any adverse employment action stemming from the incident giving rise to this lawsuit. Indeed, the undisputed facts in the case show that Defendant has never disciplined Plaintiff in any way, for any reason. Although Plaintiff alleges that he was discriminated against on the basis of his race and/or union preference because Defendant failed to investigate the incident and punish McDonald properly, he does not allege a legally cognizable adverse employment action as required to establish a *prima facie* case.

To be adverse, an employer's action must constitute "a significant change in employment status, such as hiring, firing, failing to promote,

reassignment with significantly different responsibilities, or a decision causing a significant change in benefit." *Sanchez v. Denver Pub. Sch.*, 164 F.3d 527, 533 (10th Cir. 1998). Here, Plaintiff's job status was not affected in any way. Plaintiff's dissatisfaction with the way in which Defendant handled the incident simply does not rise to the level of an adverse employment action. *See, e.g., Hopkins v. Women's Div., Gen. Bd. of Global Ministries*, 284 F. Supp. 2d 15, 26 (D. D.C. 2003) (holding that "plaintiff's claims relating to the denial of . . . her requests to have a support staff member disciplines do not rise to the level of adverse employment actions"); *Colter v. Dobski & Assoc.*, 35 F. Supp. 2d 824, 830 (D. Kan. 1999) (finding that causing frustration, hurt feelings, or humiliation, without alteration to the employee's status, is not adverse employment action); *Smart v. Ball State Univ.*, 89 F.3d 437, 441 (7th Cir. 1996) (noting that "not everything that makes an employee unhappy is an actionable adverse action"). In short, the employer's conduct must have some impact on the plaintiff's employment status in order to be considered an adverse employment action. *Sanchez*, 164 F.3d at 533. Plaintiff here did not suffer any adverse employment action. Indeed, the actions taken on Plaintiff's behalf to address the incident and punish McDonald were apparently far from inadequate, as Plaintiff alleges, because Plaintiff was not confronted by McDonald again. In light of these facts, Plaintiff's claim borders on frivolous.

Appendix B

II. Plaintiff's "hostile work environment" claim.

Plaintiff complains that he was the only black AMFA organizer, and that he was the only organizer McDonald harassed. Plaintiff further asserts that as part of his attack, McDonald made "African gibberish" noises, and other onlookers made "monkey motions" and otherwise degraded black people. He also asserts that Carmine Romano "approved" of McDonald's actions, although he offers no evidence to support this allegation. Plaintiff admits, however, that McDonald did not use specific racial slurs toward him, and that the incident on September 9, 2003 was the only time he has been harassed in this manner. In sum, Plaintiff was not subject to a "hostile work environment."

In order to establish a hostile work environment, a plaintiff must prove that (1) he belongs to a protected group; (2) he was subject to unwelcome harassment; (3) the harassment was based on or motivated by race; (4) the harassment affected a term, condition, or privilege of his employment; and (5) the employer knew or should have known of the harassment and failed to take prompt remedial action. *Hollins v. Delta Airlines*, 238 F.3d 1255, 1258 (10th Cir. 2001). Here, Plaintiff was undoubtedly subjected to unwelcome harassment. However, Plaintiff's allegations that such harassment was racially motivated are thin at best, especially when considered in conjunction with the underlying union dispute. Moreover, the undisputed facts show that Defendant promptly intervened in the incident between Plaintiff and McDonald, and that McDonald

never confronted the Plaintiff again. Defendant did not discipline Plaintiff in any way as a result of this incident, and Plaintiff's employment status was completely unaffected.

Upon review of these facts, it is clear that Plaintiff has failed to "beam the burden of establishing that the employer's conduct was unreasonable." *Id.* He has not demonstrated that Defendant was negligent because "it knew or should have known about the conduct and failed to stop it." *Id. (citing Burlington Indus. v. Ellerth*, 524 U.S. 742, 759 (1988)). He did not show that he was subject to a "steady barrage of opprobrious racial comment" as would offend Title VII. *See Johnson v. Bunny Bread Co.*, 646 F.2d 1250, 1257 (8th Cir. 1981) (holding that sporadic use of racial slurs is insufficient to trigger Title VII protections). He has not shown that McDonald's actions "unreasonably interfer[ed] with his work or performance nor adversely affected his employment opportunities." *Daemi v. Church's Fried Chicken*, 931 F.2d 1379, 1384 (10th Cir. 1991). In short, Plaintiff has wholly failed to establish *a prima facie* case of discrimination.

III. Plaintiff's union affiliation.

Plaintiff also asserts that employees have a contractual right "to organize and bargain collectively through a representative of their choosing" pursuant to 45 U.S.C. § 152(4), and that such right is protected from discriminatory acts under 42 U.S.C. § 1981. Plaintiff's argument that the McDonald incident and Defendant's subsequent investigation of and discipline against McDonald "were in opposition to and in an

effort to undermine the organizing efforts of those that sought to be represented by" AMFA is nothing short of confusing, especially in light of Plaintiff's admission that he does not know of a single mechanic who did not sign a card to force an election between AFMA and TWU because of the incident between Plaintiff and McDonald. Furthermore, this claim suffers the same factual and legal infirmities as his other claims.

First, the Court notes that union affiliation is not a protected class under § 1981. *See St. Francis Coll. v. Al-Khazanji*, 481 U.S. 604, 613 (1987) (explaining that § 1981 was enacted to prevent discrimination against an individual on the basis of his or her race or ethnic background). Any attempt to undermine the efforts "of those who sought to be represented by" AFMA is race neutral, insofar as the class is not defined by race — even though Plaintiff happens to be black — but rather by union preference or affiliation.

Second, the Court notes once again that Plaintiff did not suffer an adverse employment action as a result of his union activities. In fact, Defendant gave Plaintiff permission to distribute AFMA flyers. Defendant also acted to stop McDonald's harassment of Plaintiff while Plaintiff was engaged in this activity. Plaintiff admits that he was not disciplined in any way as a result of the McDonald incident.

Appendix B

Conclusion

Plaintiff here has wholly failed to establish a *prima facie* case of discrimination. Accordingly, Defendant's Motion for Summary Judgment is GRANTED in its entirety, and Plaintiff's Motion for Summary Judgment is DENIED in its entirety, and this case is hereby terminated.

s/ James H. Payne
James H. Payne
United States District Judge
Northern District of Oklahoma

No. 06-1336

FILED
MAY 07 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the
Supreme Court of the United States

DAVID ALAN COOPER,
Petitioner,

v.

AMERICAN AIRLINES, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the District Court properly denied Petitioner's Motion for Summary Judgment and granted American Airline, Inc.'s ("American") Motion for Summary Judgment.

2. Whether the Tenth Circuit properly affirmed the District Court's ruling that the dispute between Petitioner and a co-worker did not constitute racial discrimination within the meaning of 42 U.S.C.A. § 2000e-2(a)(1).

3. Whether the Tenth Circuit properly affirmed the District Court's ruling that American's handling of the dispute between Petitioner and a co-worker did not constitute an adverse employment action.

4. Whether the Tenth Circuit properly affirmed the District Court's ruling that the dispute between Petitioner and a co-worker was not a violation of 42 U.S.C.A. § 1981.

CORPORATE DISCLOSURE STATEMENT

The parent corporation of American Airlines, Inc. is AMR Corporation. AMR Corporation owns 100% of American Airlines, Inc.'s stock. No public company owns 10% or more of AMR Corporation's stock.

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INTRODUCTION

The Court should deny the Petition for several reasons. First, the issues presented in the Petition are not sufficiently important to warrant this Court's attention. Second, the Petition merely seeks review for purposes of disputing the factual findings below and the application of properly stated rules of law to those facts. Third, there is no circuit conflict on the questions asserted in the Petition. Fourth, the Tenth Circuit's decision is entirely consonant with the decisions of this Court. As such, there is no "compelling reason" for the Court to exercise its considerable discretion in granting the Petition.

STATEMENT OF THE CASE

1. (a). Petitioner, an African-American male, began his career with American on or about March 16, 1986 as a member of the fleet service crew in Tulsa. Despite being a member of the Transport Workers Union of America, AFL-CIO, Local 514 ("TWU"), Petitioner has actively supported the rival Aircraft Mechanics Fraternal Association ("AMFA") for several years. *See*, Appendix B, p. 9a.

In 2003 AMFA attempted to raise sufficient support among the mechanics in Tulsa to force an election to determine whether TWU or AMFA would represent the mechanics in labor relations with American. In connection with AMFA's efforts to force an election, Petitioner distributed flyers to American employees at various times with permission from American. *See*, Petition, Appendix B, p. 9a-10a.

Petitioner alleges he was harassed on September 9, 2003 when then TWU President Randy McDonald ("McDonald"),

an overhaul mechanic and a white male, confronted Petitioner as Petitioner was handing out AMFA flyers. *Id.* According to Petitioner, McDonald allegedly:

- attempted to wrestle away the AMFA literature from Petitioner
- "jumped up in my (Petitioner's) face" and pointed at him and screamed something regarding Petitioner supposedly "destroying" TWU membership;
- pressed his "lower pelvic area" against Petitioner's leg which Petitioner described as "pressing and bumping and humping" against his body; and
- made unintelligible "African gibberish" noises.
- McDonald did not use any racial slurs during the incident.

See, Petition, Appendix B, p. 9a-10a.

During the confrontation, two of American's most senior managers in Tulsa, along with American security officers, personally intervened in the incident to end the confrontation. Thereafter, American initiated an investigation. Following its investigation, American disciplined McDonald by giving him a "first-step advisory" for his conduct on September 9, 2003. *Id.*

Following the incident, Petitioner returned to his job at American where he is still currently employed. American did not discipline Petitioner in any manner whatsoever. Further, McDonald never confronted Petitioner again. *See,* Petition, Appendix B, p. 10a.

1.(b). In Response to Petitioner's blatant mischaracterization of the facts of this case in his *Statement of Facts*, American feels compelled to dispel certain of the more egregious examples of false and inflammatory

statements contained therein by referring this Court to the undisputed record of this case. First, Petitioner repeatedly asserts throughout his Petition that he was subjected to "racial slurs" during the incident in question. This is a false statement which is contrary to Plaintiff's sworn testimony and not supported by any evidence. *See*, Petition, Appendix B, p. 12a. Moreover, the District Court and the Tenth Circuit noted that Petitioner's claims of racial animosity in this case are "thin at best." *See*, Appendix B, p. 14a. Second, Petitioner's repeated claim that American's senior management condoned or encouraged the confrontation at issue in this case in any way is without any evidentiary support. Petitioner himself testified to the efforts made by two of American's most senior management officials on the Base who intervened to stop the dispute. *See*, Petition, appendix B, p. 12a. Third, Petitioner's false claim that American did not discipline the co-worker who confronted Petitioner is without support insofar as American formally disciplined him by issuing a "First-Step Advisory." *Id.*

2. Petitioner filed suit asserting a disparate treatment claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-17 and discrimination in violation of 42 U.S.C. § 1981. Petitioner premised his Title VII claim on his view that American did not sufficiently discipline McDonald in connection with the incident with McDonald. Additionally, Petitioner alleged American discriminated against him in violation of § 1981 by allegedly denying him an equal right to contract for the union representation of his choice.

3. The District Court granted American's Motion for Summary judgment and denied Petitioner's Motion for Summary Judgment. *See*, Petition, Appendix B. With respect to Petitioner's Title VII claims (American also moved for summary judgment on Petitioner's un-pled Title VII hostile

work environment claim) and § 1981 claim, the District Court concluded that Petitioner had not met his burden to establish a *prima facie* case under the familiar burden shifting analysis established by *McDonnell Douglass Corp v. Green*, 411 U.S. 792 (1973). *See, English v. Colo. Dept of Corr.*, 248 F.3d 1002, 1008 (10th Cir. 2001) (applying *McDonnell Douglas* to both Title VII and § 1981 claims). Specifically, the District Court held that Petitioner did not allege a legally cognizable adverse employment action noting that Petitioner's claim "borders on frivolous." *See*, Petition, Appendix B, p. 13. Further, the District Court found that Petitioner's allegations of racially motivated conduct were "thin at best." *See*, Petition, Appendix B, p. 14. The District Court also found that American acted reasonable in responding to the incident. *See*, Petition, Appendix B, p. 14a. The Tenth Circuit affirmed on essentially the same grounds. *See*, Petition, Appendix A.

REASONS FOR DENYING THE PETITION

I. The Issues Presented in the Petition Are Not Sufficiently Important to Warrant This Court's Attention.

The only real questions Petitioner raises in his Petition turn on the particular facts of this case alone and are of interest only to the parties to it. The Petition does not set forth any of the traditional grounds for this Court to exercise its discretion to grant certiorari. The Petition does not establish that the Tenth Circuit's decision is in conflict with the other Circuits or a decision of this Court. The Petition does not establish that the Tenth Circuit has decided an important question of federal law that has not, but should be, settled by this Court. The Petition merely contends that the

Tenth Circuit improvidently affirmed the District Court's grant of summary judgment in favor of American.

In essence, Petitioner asks this Court to make a third review of the undisputed record to see if it can find what two previous courts have been unable to find – evidence of unlawful discrimination. This Court has ruled that such fact canvassing is not a task to be served by a grant of certiorari. "We do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston,* 268 U.S. 220, 227 (1925). Moreover, in the realm of factual review and analysis, the rulings of the courts below are treated with and entitled to great weight. *General Talking Pictures, Corp. v. Western Electric Co, et al,* 304 U.S. 546 (1938) (Concurrent findings of the District Court and the Court of Appeals on questions of fact are not disturbed unless plainly without support or evidence). In the present case, Petitioner raises questions turning entirely on the facts of this case, already resolved twice in favor of American, and without any impact outside the boundaries of this case. Therefore, certiorari should be denied.

II. The Petition Seeks to Dispute the Factual Findings Below and the Application of Properly Stated Rules of Law to Those Facts.

The Honorable Judge James Payne of the District Court granted summary judgment against Petitioner and in favor of American based upon on a host of undisputed facts. *See*, Petition, Appendix B. In support, Judge Payne rendered a well reasoned ten page Order which applied properly stated rules of law to the undisputed facts of this case. *Id.* Tellingly, in thoroughly analyzing Petitioner's claims the opinion remarks how such claim(s) "borders on frivolous" are "thin at best" and "are nothing short of confusing." *See*,

Petition, Appendix B, pp. 13a, 14a, and 16a, respectively. Likewise, the Tenth Circuit affirmed this decision based on the undisputed record before it. *See*, Petition, Appendix A. With his Petition, Petitioner makes his third attempt to establish the facts of this case in his favor.

Petitioner disputes the factual findings of the District Court and the undisputed record before the Tenth Circuit by introducing unsupported factual allegations in his *Statement of the Case*. *See*, Petition, pp. 2-11. In addition, Petitioner argues that the Tenth Circuit did not properly apply precedents from this Court and the Tenth Circuit to those facts. *See*, Petition, pp. 2-15. Notably, Petitioner does not allege the Tenth Circuit failed to apply the correct law; Petitioner merely disputes the Tenth Circuit's application of such law.

Petitioner's attempt to re-argue the merits of his case before this Court as a basis for certiorari is a practice previously rejected by this Court. *See*, *Johnston* and *General Talking Pictures*, *supra*. This Court's traditional refusal to grant certiorari on such a basis is based, at least in part, on its recognition that a district court is the appropriate forum to determine the facts of a particular case:

> The hearing of contentions as to disputed facts, the sorting of documents to select relevant provisions, ascertain their ultimate form and meaning in the case, the practical construction put on them by the parties and reduction of the mass of conflicting contentions as to fact and inference from facts, is a task primarily for a court of one judge, not for a court of nine.

Kennedy v. Silas Mason Co., 334 U.S. 249, 256 (1948) (rationale for denying certiorari).

Petitioner seeks a factual review of this matter by this Court by asserting that the Tenth Circuit's recent decision in *Herrera v. Lufkin Industries*, 474 F.3d 675 (10th Cir. 2007) "causes Mr. Cooper to question the District Court's grant of summary judgment (with respect to Petitioner's un-pled hostile work environment claim[1]) in favor of American". *See*, Petition, p. 13. However, the *Herrera* decision does not overrule or modify any of the standards utilized by the Tenth Circuit in this case. Petitioner is merely asking this Court to re-examine the facts of this case in hopes of it reaching a different conclusion than the District Court or the Tenth Circuit.

In *Herrera*, the Tenth Circuit reversed the district court's grant of summary judgment in a hostile work environment claim where, unlike the instant case, the plaintiff presented evidence of numerous incidents of racially derogatory conduct directed toward plaintiff. *Herrera*, 474 F.3d at 680-683. In so ruling, the *Herrera* court invoked the well settled rule of law that a plaintiff in a hostile work environment claim must establish that "the workplace is permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently *severe or pervasive to alter the terms and conditions of the victim's employment* and create an abusive working environment...and the victim was targeted for harassment because of [his]...race or national origin." *Herrera*, 474 F 3d at 680. Further, to make a showing of a persuasively hostile work environment

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[1] Petitioner's Complaint does not contain a cause of action for Title VII hostile work environment. *See*, Complaint. In an abundance of caution, American addressed this claim in moving for summary judgment. The District Court considered the evidence and applied the appropriate standard in determining Petitioner did not establish a *prima facie* case. *See*, Petition, Appendix B, pp. 14a-15a.

plaintiff must make a showing of "*a steady barrage of opprobrious racial comments*." *Id.* (Emphasis added).

With respect to this matter, the Tenth Circuit, in affirming the District Court's rejection of the hostile work environment claim, noted the District Court's finding that Petitioner's allegations of racially motivated harassment "are thin at best". *See*, Petition, Appendix B, p. 14a. Further, the Tenth Circuit affirmed the District Court's determination, using the same standard as later applied in *Herrera*, that the alleged harassment did not affect "*a term or condition of Mr. Cooper's employment* and did not constitute the '*steady barrage of opprobrious racial comment*' as would offend Title VII." *Id.* (Emphasis added). Accordingly, the District Court and the Tenth Circuit examined the facts of this case and employed the same standards set forth in *Herrera* to determine that Plaintiff did not establish a *prima facie* case of hostile work environment discrimination. Now, Petitioner wants a third court to apply the same standard to these facts in hopes of obtaining a different result. This is not an appropriate basis for certiorari.

III. The Tenth Circuit's Decision is Not in Conflict With Other Circuits.

The principal purpose for which this Court uses certiorari jurisdiction is to resolve conflicts among the Circuit Courts of Appeals concerning the meaning of provisions of federal law. *Braxton v. U.S.*, 500 U.S. 344, 347 (1991). Not surprisingly, Petitioner invokes this common rationale for certiorari by falsely claiming the Tenth Circuit's decision with respect to Petitioner's § 1981 claim is in conflict with the Third and Sixth Circuits. *See*, Petition, pp. 15-16. However, this basis for granting certiorari has no application to this case because

there is no real conflict among the Circuits resulting from the Tenth Circuit's decision.

In the instant case, the Tenth Circuit applied *Hampton v. Dillard Dep't Stores, Inc.*, 247 F. 3d 1091, 1102 (10th Cir. 2001), which utilizes the familiar burden shifting analysis established by this Court in *McDonnell-Douglas Corporation v. Green*, 411 U.S. 792 (1973), to determine whether Petitioner established a *prima facie* case under §1981. *See*, Petition Appendix A, p. 6A. Notably, the Third and Sixth Circuits employ the same *McDonnell-Douglass* burden-shifting analysis as adopted in the Tenth Circuit. *See*, *Pamintuan v. Nanticoke Memorial Hosp.*, 192 F.3d 378, 385 (3rd Cir. 1999) ("We analyze Section 1981 claims under the familiar *McDonnell-Douglass* shifting burden framework used in Title VII cases."); and *Bell v. Ohio State Univ.*, 351 F.3d 240, 253 (6th Cir. 2003)("... a claim of discrimination under Section 1981 ... requires evidence sufficient to make out a prima facie case of discrimination under *McDonnell Douglass*..."). Thus, there is no real conflict in the stated rule of law as the Third, Sixth and Tenth Circuits are all employing the same standard set forth by this Court.

In the Petition, Petitioner mistakenly alleges that the Tenth Circuit's decision conflicts with the Third Circuit's decision in *Intern. Ass'n of Mach. v. N.W. Airlines*, 673 F.2d 700 (3rd Cir. 1992) and the Sixth Circuit's decision in *United Transp. Un. v. Grand Truck West R. Co.*, 901 F.2d 489 (6th Cir. 1990). However, these Third Circuit and Sixth Circuit opinions are inapposite to the issues that were addressed by the Tenth Circuit in this matter. Neither of these cases addresses the issue confronted by the Tenth Circuit in this case, *i.e.*, whether Petitioner properly established a *prima facie* case of discrimination under Title VII or § 1981. Rather, the Third and Sixth Circuit decisions cited by

Petitioner address very narrow collective bargaining issues under the Railway Labor Act, 45 U.S.C.A. § 151, *et seq.* ("RLA"). *See*, *N.W. Airlines*, 673 F.2d at 703 (Third Circuit considered whether employer's disciplinary action regarding union activities constitutes a "minor" dispute under the RLA); and *United Transportation Union*, 901 F.2d at 490 (Sixth Circuit considered employer's collective bargaining obligations under the RLA). Indeed, neither of the plaintiffs in these cases asserted claims under Title VII or § 1981. *Id.* As such, Petitioner has wholly failed to demonstrate that any conflict exists among the Circuits regarding this well settled rule of law.

IV. The Tenth Circuit's Decision Is Consistent With This Court's Precedent.

The Petitioner asserts in the Petition that the Tenth Circuit's decision is inconsistent with this Court's precedent. *See*, Petition, pp. 14-15. There is no basis for this claim. As set forth above, the Tenth Circuit applied well settled precedent emanating from this Court to determine whether Petitioner properly established a *prima facie* case of discrimination under Title VII or § 1981. The fact that the Tenth Circuit justifiably determined that Petitioner did not meet this well established standard is the real source of Petitioner's dispute.

In the Petition, Petitioner incorrectly alleges that the Tenth Circuit's decision is in conflict with this Court's holding in *Virginian Ry. Co. v. System Federation No. 40, et al.*, 300 U.S. 515 (1937). *See*, Petition, pp. 14-15. This Court's decision in *Virginian* is distinct and remote from the instant dispute. In *Virginian*, this Court addressed questions as to the constitutionality of certain provisions of the RLA and as to the nature and extent of the relief which courts are authorized to

give under the RLA. *Virginian*, 300 U.S. at 539. Such issues are not in dispute in this lawsuit. Moreover, the *Virginian* Court did not address the standards for a plaintiff to establish a *prima facie* case of discrimination under Title VII or § 1981.

Petitioner also claims that Tenth Circuit's decision is in conflict with *Gratz v. Bollinger*, 539 U.S. 244 (2003). Tellingly, the Petition makes no attempt to articulate how *Gratz* conflicts with the Tenth Circuit's decision.[2] Regardless, the *Gratz* decision does not relate to the issues before the Tenth Circuit in this matter. The *Gratz* Court confronted the constitutionality of the University of Michigan's admission procedure. *Id.* at 244-245. As part of its holding the Court determined that the policy violated § 1981. The Court addressed the § 1981 claims in a footnote observing a "contract for educational services is a 'contract' for purposes of §1981 and...purposeful discrimination that violates the Equal Protection Clause...will also violate §1981." *Id.* at footnote 23.

Petitioner also claims that Tenth Circuit's decision is in conflict with *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470 (U.S. 2006). The *Domino's* Court considered the issue of standing to assert a §1981 claim by holding that a plaintiff cannot state a § 1981 claim unless he has, or would have, rights under existing contract that he "wishes to make and enforce." *Id.* at 1251-1252. Notably, the Tenth Circuit did not address nor base its decision on whether or not Petitioner had standing to assert a § 1981 claim. The Tenth Circuit

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[2] The Petition attributes a quote to the *Gratz* Court which actually derives from the Court's opinion in *Domino's Pizza*. American will address this issue below.

merely concluded Petitioner failed to establish a *prima facie* case under § 1981. Thus, there is no conflict between the Tenth Circuit's decision and the Court's holding the *Domino's* case.

Petitioner's ill-conceived citations to RLA and § 1981 decisions by this and other courts that do not relate to issues confronted by the Tenth Circuit in this matter wholly fail to support Petitioner's Petition. Such decisions are not impacted by this case nor were the rules of law stated therein necessary for the determination of Petitioner's claims. Indeed, Petitioner has not cited one single decision that is impacted in any way by the Tenth Circuit's decision in this case. Thus, Petitioner has failed to establish that the Court must exercise certiorari jurisdiction to resolve a decision which is inconsistent with this Court's precedent.

CONCLUSION

For these reasons, the Court should deny the Petition.

Respectfully submitted,

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